Loh Seng Lee v Yunley Enterprise Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS P-02–474 OF 2007 AND P-02–563 OF 2007
SURIYADI, ABU SAMAH NORDIN AND SULONG MATJERAIE JJCA
5 SEPTEMBER 2008

Land Law — Charge — Order for sale — Default in payment — Sale by auction — Validity of — Whether sale of two lands auctioned together illegal and nullity pursuant to s 263(3) of the National Land Code

Land Law — Sale of land — Order for — Collective sale order by land administrator — Whether 'decision' within s 418(3) of the National Land Code — Whether acts of land administrator justified

The respondent was granted banking facilities by the bank ('MBB') secured by charge of two pieces of land. However, the respondent defaulted in the payment. As a result, MBB commenced an action against the respondent and the guarantors. Simultaneously, MBB applied, successfully, for a foreclosure action by applying to the land administrator for an order of sale of the charged lands, which was sold to the appellant/successful bidder on 13 May 2005. Meanwhile, the respondent filed and obtained an injunction order to restrain MBB from selling the lands by public auction on an ex parte basis, on the same day. However, it was subsequently dismissed after an inter parte hearing. The respondent subsequently filed an originating summons for a declaration that the auction as well as the sale of the lands to the appellant was null and void ab initio. The respondent argued, inter alia, that the lands were wrongfully sold together in the same auction and that the application under Form 16G of the National Land Code ('NLC') was defective. The application was successful whereupon the judge granted a declaration that the public auction was invalid and further ordered the appellant to transfer the lands back to the respondent. Hence this appeal.

Held, allowing the appeals with costs:

(1) A decision or direction by the land administrator to auction two pieces of land together was a 'decision' within the definition of s 418(3) of the

NLC. The correct course of action that should have been taken by the respondent was to file an appeal, which it had failed to undertake (see para 10).

(2) The respondent failed to supply a proper picture of the application in the originating summons seeking a declaration that the auction held on 13 May 2005 was void ab initio. There was no untoward act, failure to adhere to statutory procedure or evidence worthy of consideration that was adduced to establish that the exercise of the auction was tainted. And even if it did, the failure to have the correct order pleaded should not be held against the appellant (see para 12).

(3) The argument that the collective sale order was illegal was untenable as there were facts before the land administrator justifying the collective sale. Further, s 257(2) of the NLC grants discretionary power to the land administrator to either sell together or separately the two adjoining pieces of land (see para 14).

[Bahasa Malaysia summary

Responden diberikan kemudahan perbankan oleh bank ('MBB') yang dijamin dengan gadaian dua bidang tanah. Walau bagaimanapun, responden ingkar dalam pembayaran. Oleh yang demikian, MBB memulakan tindakan terhadap responden dan penjamin-penjaminnya. Pada masa yang sama, MBB berjaya dalam permohonannya untuk tindakan halang tebus dengan memohon kepada pentadbir tanah untuk perintah jualan tanah-tanah yang digadai tersebut, yang dijual kepada perayu/penawar yang berjaya pada 13 Mei 2005. Sementara itu, responden memfailkan dan memperoleh perintah injunksi untuk menghalang MBB daripada menjual tanah-tanah tersebut melalui lelongan awam secara ex parte, pada hari yang sama. Walau bagaimanapun, ia kemudiannya ditolak selepas perbicaraan inter parte. Responden kemudian memfailkan saman pemula untuk satu deklarasi bahawa lelongan tersebut dan juga jualan tanah-tanah tersebut kepada perayu adalah tidak sah dan batal ab initio. Responden menghujah, antara lain, bahawa tanah-tanah tersebut telah dijual bersama secara salah di dalam lelongan yang sama dan permohonan di bawah Borang 16G Kanun Tanah Negara ('KTN') adalah cacat. Permohonan tersebut berjaya di mana hakim membenarkan deklarasi bahawa lelongan awam tersebut tidak sah dan selanjutnya mengarahkan perayu untuk memindahkan semula tanah-tanah tersebut kepada responden. Maka rayuan ini.

Diputuskan, membenarkan rayuan-rayuan dengan kos:

(1) Sesuatu keputusan atau arahan oleh pentadbir tanah untuk melelong dua bidang tanah bersama adalah satu 'keputusan' dalam rangkuman

definisi s 418 KTN. Tindakan yang betul yang sepatutnya diambil oleh responden ialah untuk memfailkan rayuan, yang ia gagal untuk ambil (lihat perenggan 10).

(2) Responden gagal untuk memberikan gambaran yang jelas tentang permohonan di dalam saman pemula memohon deklarasi bahawa lelongan yang dijalankan pada 13 Mei 2005 adalah batal ab initio. Tidak terdapat tindakan yang tidak diingini, kegagalan untuk mematuhi prosedur statutori atau keterangan yang wajar untuk dipertimbangkan yang dikemukakan untuk membuktikan bahawa pelaksanaan lelongan adalah cacat. Dan walaupun ia cacat, kegagalan untuk memplidkan perintah yang betul tidak boleh digunakan terhadap perayu (lihat perenggan 12).

(3) Hujahan bahawa perintah jualan bersama adalah tidak sah tidak dapat dipertahankan kerana terdapat fakta-fakta di hadapan pentadbir tanah untuk menjustifikasi jualan bersama. Selanjutnya, s 257(2) KTN memberikan kuasa budi bicara kepada pentadbir tanah sama ada untuk menjual bersama atau secara berasingan kedua-dua tanah yang bersebelahan (lihat perenggan 14).]

Notes

For cases on order for sale, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2255–2382.

For cases on order for sale of land, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4131–4234.

Cases referred to

Land Executive Committee of Federal Territory v Syarikat Harper Gilfillan Berhad [1981] 1 MLJ 234, FC (refd)

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77; [1997] 2 CLJ 36, FC (refd)

OCBC Bank (M) Bhd v Kredin Sdn Bhd [1997] 2 MLJ 544; [1997] 2 CLJ 534, CA (refd)

Legislation referred to

National Land Code ss 257(2), 260, 261, 262, 263, 263(3), 264, 265, 418, 418(1), (3), Forms 16D, 16G

Appeal from: Originating Summons No MT3–24–1279 of 2005 (High Court, Pulau Pinang).

SC Tan (CK Ung with him) (Cheong Wai Meng & Van Buerle) for the appellant in Civil Appeal No P-02–474 of 2007.

R Kamalanathan (Vinod R Kamalanathan with him) (Vinod Kamalanathan & Associates) for the respondent in Civil Appeal No P-02–474 of 2007.

Lambert Rasa Ratnam (Mong Chung Seng with him) (Lee Hishamuddin Allen & Gledhill) for the appellant in Civil Appeal No P-02–563 of 2007.
R Kamalanathan (Vinod R Kamalanathan with him) (Vinod Kamalanathan & Associates) for the first respondent in Civil Appeal No P-02–563 of 2007.SC Tan (CK Ung with him) (Cheong Wai Meng & Van Buerle) for the second respondent in Civil Appeal No P-02–563 of 2007.

Suriyadi JCA (delivering judgment of the court):

[1] As these two appeals viz P-02–474 of 2007 and P-02–563 of 2007 are interrelated, parties had decided that Rayuan Sivil P-02–563 of 2007 be heard first, with the outcome binding the other appeal. After hearing the appeal, we unanimously allowed it with costs, and accordingly set aside the order of the High Court; and by agreement too, appeal P-02–474 of 2007 was allowed with costs and the relevant consequential High Court orders were set aside. For ease of reference of this judgment, I shall allude to the facts and issues of the latter case as we go along.

[2] To appreciate the matter fully it is necessary that we reproduce the factual matrix followed thereafter by the antecedents that led to this appeal. Yunley Enterprise Sdn Bhd, the plaintiff in P-02–474 of 2007 ('respondent') was granted banking facilities by the Pacific Bank Berhad (now known as Malayan Banking Bhd ('MBB'), and as security, charged two pieces of land (details in the intitulment), which form the subject matter of this appeal. In default of payment, MBB commenced an action at the Kuala Lumpur High Court vide Suit No D2–22–158 of 1998 ('Kuala Lumpur case') against the respondent and the guarantors. At the same time, MBB also commenced a foreclosure action by applying to the land administrator for an order of sale of the charged lands and was successful on 24 September 2002. After many postponements of the public auction, a sale finally took place at Seberang Perai Selatan Land Office on 13 May 2005, and the lands sold to Loh Seng Lee ('appellant/successful bidder').

[3] On that same day that was on 13 May 2005, the respondent had filed an injunction application to restrain MBB from selling the lands by public auction, and successfully obtained an order on an ex parte basis. The ex parte order even though was served on the MBB was subsequently dismissed after an inter parte hearing.

[4] On 19 August 2005 the respondent filed an originating summons at the Penang High Court seeking a declaration that the auction as well as sale of the lands to the appellant was null and void ab initio. The grounds relied upon, inter alia, were that the lands were wrongfully sold together in the same auction and that the application under Form 16G of the National Land Code

('NLC') was defective. The application was successful whereupon the court granted a declaration that the public auction held on 13 May 2005 was invalid and further ordered the appellant to transfer the lands back to the respondent. Being dissatisfied the successful bidder filed this appeal.

[5] The appellant's stance was simple. He ventilated that the court should not intervene in the sale of the lands as the matter was clearly within the jurisdiction of the land administrator as conferred under ss 260 to 265 of the NLC. The High Court would only be seised of jurisdiction if there were an appeal by the respondent against the decision made by the land administrator under s 418 of the NLC. In this case no such appeal was filed at the High Court.

[6] Further, the issues and facts raised by the respondent in the failed inter parte injunction application in the Kuala Lumpur case were essentially the same as those raised in the originating summons. When dismissing the injunction application on 30 August 2005, the Kuala Lumpur High Court had decided that there were no merits in the matters raised by the respondent. As there was no appeal against this decision the respondent should not be allowed to raise the same issues again to challenge the auction and sale of the charged lands. The appellant had correctly submitted that the principle of res judicata and issue of estoppel thus applied here. The appellant further added that the application for the order for sale, the auction, as well as the sale of the land had been properly conducted let alone he too had already paid the full purchase price to MBB.

[7] The respondent's main contentions, amongst others were as follows:

(i) as the lands held land office titles they must be sold pursuant to s 260 and 263 of the NLC and must be offered for sale individually. This demand is provided for in s 257(2) of the NLC;

(ii) by not auctioning the lands separately, MBB had failed in its fiduciary obligations, by not securing the best price or value for the lands thus reducing the amount allegedly being owed; and

(iii) MBB's application dated 17 November 2003, for the order for sale pursuant to the public auction under Form16G of the NLC was defective and void in law. That application was supported by a statutory declaration, which was dated 15 July 1998, a document dated five years prior to when that Form 16G was prepared.

[8] Based on the above reasons the respondent ventilated that the impugned order thus was illegal or one that was a nullity pursuant to s 263(3) of the NLC and therefore unenforceable.

[9] Having perused the learned judge's decision we noted that he had arrived at certain factual findings, inter alia, that he had concluded that as both lands were sold collectively, the sale thus was in breach of s 263(3) of the NLC, and hence invalid and void. By selling the lands in that manner, the respondent was deprived of having the opportunity to redeem at least one of the lands or obtaining the best value and price. He also opined that the issue of estoppel and res judicata were not applicable, as there was no reference to the notes of proceedings from the Kuala Lumpur case during the hearing of the originating summons. The learned judge was of the opinion that he should not be restrained from hearing and deciding the issue raised before him. By MBB intentionally re-using the same instruments (Form 16D and statutory declaration) from a previous application, which had been cancelled, misrepresentation on the land administrator had taken place and as such the order for sale dated 4 April 2005 was invalid and void (*Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77; [1997] 2 CLJ 36).

[10] As stated above we had allowed the appeal. We were of the view that a decision or direction by the land administrator to auction the two pieces of land together was a 'decision' within the definition of s 418(3) of the NLC. On the proper reading of s 418(1) of the NLC, the correct course of action for the respondent to take was to file an appeal, of which it had failed to undertake, instead of taking the circuitous route (*Land Executive Committee of Federal Territory v Syarikat Harper Gilfillan Bhd* [1981] 1 MLJ 234).

[11] It was crystal clear that the application was for a declaration that the auction held on 13 May 2005 was void ab initio with the cause of action statement zeroing on Form 16G dated 17 November 2003 as the basis of the auction (RR 52 Jil 1). Having perused the evidence we found this statement very misleading. The evidence showed that the very first order of sale obtained by MBB was on 24 September 2002, to be followed by the misleading order of 2 July 2004. As the properties could not be auctioned off under the 24 September 2002 order MBB had no choice but to put up another application, for order of sale (RR113 of Jil 1) on 17 November 2003, which order was granted on 3 June 2004. Again MBB failed to exploit this order of 3 June 2004. Due to that failure MBB had written in to the land office and in response the land office issued an order of sale dated 4 April 2005 (RR 584) which eventually led to the 13 May 2005 auction.

[12] We were satisfied that:

(i) the order dated 2 July 2004 is misleading and has no correlation to the auction of 13 May 2005. The pleading thus is defective;

(ii) the relevant order pertaining to the 13 May 2005 auction is the order of 4 April 2005;

(iii) the respondent never complained of all the three orders of sale, the reserved prices or even of that collective mode as reflected by the want of appeal under s 418 of the NLC;

(iv) no untoward act, failure to adhere to statutory procedures or evidence worthy of consideration was adduced to establish that the exercise of the auction on 13 May 2005 was tainted;

(v) if the source of the auction ie, the order by the land administrator had caused the auction to be tainted then the failure to have the correct order pleaded should not be held against the appellant; and

(vi) the respondent failed to supply a proper picture of the application in the originating summons.

[13] The erroneous view of the learned judge on the issue of res judicata and estoppels, and their want of application here, and the error committed when he took into account evidence from a previous unsuccessful injunction application merely punched more holes in his judgment. It merely exacerbated the respondent's already weakened position (*OCBC Bank (M) Bhd v Kredin Sdn Bhd* [1997] 2 MLJ 544; [1997] 2 CLJ 534). Evidentially the affidavits of the contesting parties contained sufficient relevant references to the Kuala Lumpur case, as we found in the course of our scrutiny of the documents.

[14] The submission by learned counsel for the respondent, in the appeal before us, did not help his client's case either when the thrust of his argument was mostly directed at the collective sale order. Counsel had submitted that as the collective sale order was illegal it could thus be ignored even to the extent of leap-frogging s 418 of the NLC. We found this argument untenable as there were facts before the land administrator, which justified the collective sale, bearing in mind that there are provisions that grant discretionary power on the land administrator under s 257(2) of the NLC to either sell together or separately the two adjoining pieces of land. Here a factory building had already been erected on both pieces of lands. Surely selling two pieces of land separately, while having a factory running across both of them, would lead to an absurd result, with two separate successful bidders sharing a building? There will be no end to the disputes arising from that hypothetical situation. Had an appeal been filed all these matters could have been trashed out fully, but as stated above, that was not done.

[15] Based on the above grounds, which certainly did not deserve detailed judicial activism, this panel had allowed the appeal with costs.

Appeals allowed with costs.

Reported by Augustine Soosay